

Women as Judges: A Latina Judge's Voice

Seton Hall School of Law

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Thank you for that lovely introduction. I am delighted to be here tonight at a law school, Seton Hall, for which a woman, Miriam T. Rooney, served as the first woman law school dean in the history of American legal education in 1950. That was only four years before my birth. During the year of my birth in 1954, the seminal case in race desegregation, Brown v. Board of Education, was decided. This is the 50th year anniversary of that case and many colloquies are being held discussing the impact of that decision in our society.

Being a Latina woman who has been fortunate enough to achieve a prominent position in the legal profession and who is therefore one of the direct recipients of the Brown legacy, it is a particularly privileged feeling to have been invited to speak here by the Latin American Law Students Association. I also thought that this invitation provided a wonderful opportunity for me to discuss with you how far women and people of color have come in the legal profession during my lifetime but also my reflections of what we contribute as judges to the profession. I intend to talk to you about my Latina identity, where it came from, and the influence I perceive gender, race and national origin representation will have on the development of the law.

The Hispanic side of my identity was forged and closely nurtured by my family through our shared experiences and traditions. For me, a special part of my being a Latina are the muchos platos de arroz, guandoles y pernil that I have eaten at countless family functions, and the pasteles I consume every Christmas holiday meal. Part of my Latina identity is the sound of merengue at all our family parties. It is the memory of seeing Cantiflas, the famous comic, when

I was a kid with my aunt and cousins at the Saturday afternoon movies. My Latina soul was further nourished each weekend that I visited and played in abuelita's (grandma's) house with my cousins and other extended family members who were my friends as I grew up. Being a Latina child was watching the adults play dominos on Saturday night and us kids playing lotteria with chick peas as abuelita called out the numbers.

Does any one of these things make me a Latina? No, obviously not, because each of our Caribbean and Latin American communities has their own unique foods and different traditions at the holidays. I happen to speak Spanish, but my brother, only three years younger, like too many of us educated here, barely speaks Spanish. And even those of us who do speak Spanish, speak it poorly.

If I had pursued my career in my undergraduate history major, I could likely provide you with a very academic description of what being Latino or Latina means. For example, I could define Latinos as those people and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish Creole as their language of communication. That antiseptic description, however, does not really explain the appeal of merengue to an American born child. It does not provide an adequate explanation for why individuals like us, many of us whom were born in this completely different American culture, still identify so strongly with the communities in which our parents were born and raised.

America has a deeply confused image of itself that is a perpetual source of tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race- and color- blind way that ignores those very differences that in

other contexts we laud. That tension between the melting pot and the salad bowl, to borrow popular metaphors in New York, is being hotly debated today in national discussions about affirmative action. This tension leads many of us to struggle with maintaining and promoting our cultural and ethnic identities in a society which is often ambivalent about how to deal with its differences.

In this time of great debate, we must remember that it is not politics or its struggles that creates a Latino or Latina identity. I became a Latina by the way I love and the way I live my life. My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love both being a Puerto Riquena and to love America and value its lesson that great things could be achieved if one works hard for it. But achieving success here is no easy accomplishment for woman or for Latinos.

As I said, I was born in the year, 1954, in which *Brown v. Board of Education* was decided. When I was eight in 1961, the first Latino, the wonderful Judge Reynaldo Galarza in California, was appointed to the federal bench. When I finished law school in 1979, however, there were no women judges on the Supreme Court or on the highest court of my home state, New York. There was only one African-American Supreme Court Justice in 1979, and then and now, no Latino or Latina Justice on that Court.

In the last twenty plus years of my professional life, however, I have seen a quantum leap in the representation of women and Latinos in the legal profession, and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, we have seen the appointment of two female justices on the Supreme Court and four

female justices on the New York Court of Appeals, one a Chief Judge and another a Puerto Riquena, the Hon. Carmen Beauchamp Ciparick. As of today, women sit on the highest courts of almost all of the states and the territories including Puerto Rico. One Supreme Court, that of Minnesota, for a period of time had a majority of women justices.

As of September 30, 2002, the federal judiciary, consisting of supreme, circuit, and district court judges, was about 23.4% women. In 1992, when I was first appointed a district court judge, the percentage of woman in the total federal judiciary was only 13.4%. The number is less favorable for Latinos or Latinas on the federal bench. As noted, we have no Supreme Court Justices and we are only 4.3% or 67 of the active circuit court and district court judges. In 1992, the number was substantially less. As recently as 1965, however, the federal bench had only three women serving and only one Latino judge on a circuit bench. Changes are thus happening.

These figures and appointments are heartwarming. Nevertheless, much still remains to happen. Let us not forget that between the appointment of Justice Sandra Day O'Conner in 1981 and Justice Ginsburg in 1992, 11 years had passed. Similarly, between Justice Kaye's initial appointment as an associate judge to the New York Court of Appeal in 1983 and Judge Ciprack's appointment in 1993, 10 years had also passed and it took another nine years for the recent women appointments to that court. Ten years later, we are waiting for a third appointment of a woman to the Supreme Court and a second minority - male or female - albeit preferably Hispanic - to the Supreme Court.

In 1992, when I joined the bench, there were still 2 out of 13 circuit courts and about 53 out of 92 districts courts in which no women sat. At the beginning of September, 2001, there are

women sitting in all 13 circuit courts, although the First, Fifth, Eighth Circuit and Federal Circuits, each had only one female judge out of a combined total number of 48 judges, There are still nearly 37 district courts with no woman judges.

For woman of color, the statistics are even more sobering. As of September 20, 1998, of the then 195 circuit court judges, only 2 were African American women and 2 Hispanic women. Of the 641 district court judges, only 12 were African American women and 11 Hispanic women. African American women comprised only 1.56% of the federal judiciary and Hispanic American woman comprised only 1.02%. No African Americans, male or female, sit today on the Fourth or Federal Circuits, and no Hispanics, male or female, sit on the Fourth, Sixth, Seventh, Eighth, District of Columbia and Federal Circuits.

As gratifying as it has been to see more woman and people of color on the federal bench in the last twenty years, there are storm warnings we must keep in mind. In at least the last five years, the majority of nominations and judges whom the Senate delayed more than a year before confirming or never confirming were women or minorities. I need not remind you that Judge Paez of the home Ninth Circuit has the dubious distinction of having had his nomination delayed for the longest period in Senate history.¹

These figures demonstrate that there is a real and continuing need for Latino and Latina organizations like the student organization sponsoring me today and the many other community

¹For those of you interested, the figures I have been quoting come from the Annual Report on the Judiciary Equal Employment Opportunity Program issued by the Administrative Office of the United States Courts for 1992, 1998 and 2001. I have also quoted liberally from the Judicial Selection Project: Annual Report 2001 issued by the Alliance for Justice.

groups throughout the country to exist and to continue your efforts in promoting woman and men, of all colors, in their pursuit for equality in the judicial system. The focus of my speech tonight, however, is not about the struggle to get us where we are and where we need to go, but instead to discuss what it will mean to have more woman and people of color on the bench.

I have raised these statistics as a base from which to discuss a question which my colleague Judge Miriam G. Cedarbaum in a speech addressing "Women on the Federal Bench"² raised -- "the difficult question of what the history and statistics mean?" In her speech, Judge Cedarbaum expressed her belief that the number of women on the bench (and by direct inference people of color on the bench) was still statistically insignificant and that therefore, we could not draw valid scientific conclusions from the acts of so few.

Yet, we do have women and people of color in more significant numbers on the bench, and no one can or should ignore asking and pondering what that will mean, or not mean, in the development of the law. I cannot and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. Your Professor Solangelo Maldonado can easily provide you with the developing Latino scholarship in this debate.³

Judge Cedarbaum expresses concern with any analysis of women (and presumably again people of color) on the bench which begins, and presumably ends, with a statement that women or minorities are different than men. She sees danger in presuming that judging should be gender

² Reprinted in Vol. 73 of the Boston University Law Review 39.

³ For those of you interested in the topic as it relates to women, I commend to you a wonderful compilation of articles written on the subject in Volume 77 of *Judicature*, The Journal of the American Judicature Society for November-December 1993. This Journal is published out of Chicago, Illinois

or anything else based. She rightly points out that the perception of differences between men and woman is what led to many paternalistic laws and to the denial to women of the right to vote because we could not "reason" or think "logically" but instead acted "intuitively".

While recognizing the potential effect of individual experiences on perceptions, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to and achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspirations, I wonder whether achieving the goal is possible in all, or even most cases, and I wonder whether by ignoring our differences as women, men or people of color, we do a disservice both to the law and society.

Whatever the reasons why we may have a different perspective as women or people of color—either as some theorists suggest because of our cultural experiences or as others postulate (like Prof Carol Gilligan of Harvard University in her book entitled In a Different Voice) because we have basic differences in logic and reasoning—is in many respects a small part of the larger practical questions we as women and minority judges and society in general must address. I accept the thesis of Professor Stephen Carter of Yale Law School in his Affirmative Action book that in any group of human beings, there is a diversity of opinions because there is both a diversity of experiences and of thought. Thus, as noted by Prof. Judith Resnik⁴

...there is not a single voice of feminism, not a feminist approach, but many who are exploring the possible ways of being that are distinct from those structured in a world

⁴ In an article entitled On the Bias: Feminist Reconsideration of the Aspirations for Our Judges.

dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not (and perhaps will never inspire to be) as solidified as the [established] legal doctrines of judging can sometimes appear to be"

No one person, judge or nominee, will speak in a feminine, female or people of color voice. I need not remind you that Justice Thomas represents a part, but not the whole, of African American thought on many subjects. Yet, because I accept the proposition that, as Professor Resnik explains, "to judge is an exercise of power" [pg 7] and because as Prof. Martha Minnow of Harvard Law School explains, there is no "objective stance but only a series of perspectives. . . . [N]o neutrality, no escape from choice" [Resnik page 10] in judging, I further accept that our experiences as women and people of color will in some way affect our decisions.

In short, as aptly stated by Professor Minnow, "Th[e] aspiration to impartiality . . . is just that—an aspiration rather than a description because it may suppress the inevitable existence of a perspective" What Professor Minnow's quote means to me is that not all women or people of color, in all or some circumstances, or me in any particular case or circumstance, but enough women and people of color, in enough cases, will make a difference in the process of judging.

The Minnesota Supreme Court has given us an example of this. As reported by Judge Wald in an article entitled Some Real-Life Observations about Judging⁵ three women on that court, with two men dissenting, agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the U.S. Court of Appeals and on state supreme courts have tended to vote

⁵Vol. 26 of the Indiana Law Review 173 (1992),

more often than their male counterparts to support claimants in sex discrimination cases and more often in cases involving criminal defendants in search and seizure cases. As recognized by legal scholars, whatever the causes, not one women or person of color in any one position, but as a group, we will have an affect on the development of the law and on judging.

In private discussions with me on the topic of differences based on gender in judging, Judge Cedarbaum has pointed out to me that the seminal decisions in race and sex discrimination have come from Supreme Courts composed exclusively of white males. I agree that this is significant except I choose to emphasize that the people who argued the cases before the Supreme Court which changed the legal landscape were largely people of color and women. I recall that Justice Thurgood Marshall, Judge Robert Carter and Judge Constance Baker Motley from my court and the first black women appointed to the federal bench and others who were involved in the NAACP argued Brown v. Board of Education. Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the court that equality of work required equality in the terms and conditions of employment. Whether born from experience or inherent physiological or cultural differences—a possibility I abhor less or discount less than my colleague Judge Cedarbaum—our gender and national origins make and will make a difference in our judging.

Justice O'Connor has often been cited as saying that "a wise old man and a wise old woman reach the same conclusion" in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes the line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, if Professor Martha Minnow is correct, there can never be a universal definition of "wise." Second, I would hope that a wise Latina

woman with the richness of her experiences would, more often than not, reach a better conclusion.

Let us not forget that wise men like Oliver Wendel Holmes and Cardozo voted on cases upholding both sex and race discrimination. Until 1972, no Supreme Court case ever upheld the right of a women in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. As Judge Cedarbaum pointed out, nine white men (or at least a majority) on the Supreme Court in the past have done so on many occasions for different issues. However, to understand takes time and effort, something not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Yet others simply do not care. In short, I accept the proposition that a difference will be made by the presence of women and people of color on the bench and that my experiences will affect the facts I choose to see as a judge. I hope that I will take the good and extrapolate it further into other areas than those with which I am familiar. I simply do not know exactly what that difference will be in my judging, but I accept that there will be some based on my gender and my Latina heritage and those experiences my background has imposed on me.

It is clear to me that many law students view me as a role model. When they tell me that, I feel privileged and deeply touched because I understand how hard it is to dream about doing things in life unless you know that the possibility of succeeding does exist. Both women and people of color who have been parties before me have told me that they feel empowered in the legal system when they know someone like them is judging their case. This type of impact is

immediate and the most palpable. The less tangible but perhaps more important is the one I am talking about - how our experiences affect the law.

Borrowing from a concept set forth by Elaine Martin in a forward to a Judicature volume on female voices in the judiciary:

Scholars are well placed, numbers-wise, to begin the proposition that the presence of women [and minority] judges make[s] a difference in the administration of justice. Yet, a new set of problems arises for such researchers. Just what is meant by difference, and how is it measured? Furthermore, if differences exist, why do they exist and will they persist over time? In addition to these empirical questions, there are normative ones. Are these possible [gender] differences good or bad? Will they improve our system of laws or harm it?

Professor Martin's quote informs me that my quest for answers is likely to continue indefinitely. I hope that by raising the questions today, you will start your own evaluations. For people of color and female lawyers, what does or should being a women or ethnic minority mean in your lawyering? For male lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach? How do we, men and women, cope with and alter the fact, as noted by Judith Resnik, that in every task force study of gender bias in the courts, women and people of color lawyers and judges report in significantly higher percentages than white men that gender and race shape their careers from hiring, retention to promotion, and

that a statistically significant number of women and minority lawyers and judges have both experienced and seen bias in the courtroom?

Each day on the bench, I learn something new about the judicial process and its meaning, about being a professional Latina woman in a world that sometimes looks at us with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and continuous vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent my limited abilities and capabilities permit me, that I reevaluate and change them as circumstances and cases before me require. I can and do, like my colleague Judge Cedarbaum, aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but must attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate. There is always danger in relative morality but since there are choices we must make, let us make them by informing ourselves on the questions we must not avoid asking and by continuously pondering.

We must all continue, individually and in voices united in organizations like your student association, to think about these questions and figure out how we go about creating the opportunity for there to be more women and people of color on the bench, so we can finally have statistically significant numbers to measure the differences we will and are making.

I am delighted to have been here tonight and extend, once again, my deepest gratitude to all of you for listening to me and letting me share my reflections on being a Latina voice on the bench.